Neutral Citation: **[2023] UKUT 00302 (TCC)**

Case Number: UT/2022/000096

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

PROCEDURE –FTT correct to hold that HMRC were not required to disclose various information requested by trader in Kittel case – Where HMRC's case was on basis that someone in trader company had requisite knowledge, HMRC did not have to provide identities of specific individuals said to have knowledge of connection to fraud – FTT also entitled to hold HMRC did not need to provide particulars of alleged fraud – FTT wrong however to rule that HMRC did not need to have first pleaded a case that a specified individual had actual knowledge if it wanted to put to a specific witness of the appellant that the witness had actual knowledge of connection to fraud – appeal allowed in part

Heard on: 11 September 2023
Judgment date: 14 December 2023

Before

JUDGE SWAMI RAGHAVAN
JUDGE ASHLEY GREENBANK

Between

AMMANFORD RECYCLING LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Howard Watkinson, Counsel, instructed by Blackfords LLP

For the Respondents: Christopher Foulkes, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against a procedural decision of the First-tier Tribunal *Ammanford Recycling Limited v HMRC* issued on 14 June 2022 following a hearing on 28 April 2023 (**"the FTT Decision**"). The FTT Decision refused the appellant's application for a direction that HMRC provide further information regarding HMRC's case in the appellant's substantive appeals before the FTT.

2. The substantive appeal of the appellant ("**Ammanford**"), a scrap metal dealer, is against HMRC's denial of VAT repayment on the basis the appellant knew or ought to have known the relevant transactions were connected with fraudulent evasion of VAT on the basis of the principles set out in *Kittel*[1] ("**the "*Kittel* appeal**"), and an associated penalty imposed on the appellant under s69C Value Added Tax Act 1994 ("**VATA 1994**") which HMRC had also notified the directors they were personally liable for pursuant to s69D VATA 1994 ("**the s69D appeal**").

3. A key issue Ammanford raises concerns the situation that arises when HMRC argue a corporate body has actual knowledge of fraud for the purposes of the *Kittel* principles. Before us, the parties accept that where the appellant is a company, HMRC do not have to show that an identified person had the requisite knowledge; it is enough that *someone* acting on behalf of the company must have had actual knowledge that the transactions were connected with fraud. HMRC had however indicated to the FTT at the hearing, that it was open to them, and even, they say, that they ought to, put to the appellant's witnesses in cross-examination, that the particular witness had actual knowledge the transactions were connected to fraud. Despite proposing to ask such questions premised on the particular individual having actual knowledge the transactions were connected to fraud, HMRC maintain that they need not identify, in advance, in their Statement of Case, that the witness had such knowledge. Ammanford's case before the Upper Tribunal is that the FTT was wrong to agree with HMRC that such prior identification of specific persons was not necessary. It also argues the FTT erred in law in other respects in refusing the appellant's application for provision of information including in holding that HMRC did not have to specify the particular type of fraud that was alleged to have given rise to the loss of VAT. With the permission of the FTT, Ammanford now appeals to the Upper Tribunal against the FTT Decision.

PROCEDURAL BACKGROUND

4. In this section we outline the procedural background which gave rise to the issues before the FTT. In the following section, we have summarized the FTT's reasoning for refusing the application. We provide further detail as appropriate in our discussion section of the grounds.

5. The substantive proceedings before the FTT are still at a relatively early stage. HMRC served their Statement of Case and then their evidence. So-called *Fairford* directions have been agreed by the parties but have not yet been endorsed by the FTT. (These directions, followed from the guidance of the Upper Tribunal's decision in *HMRC v Fairford Group plc* [2014] UKUT 0329 (TCC)[2]). The purpose of the directions is to require the appellant to identify the evidence which it wishes to test in cross-examination but without advancing positive evidence. They require the appellant to notify HMRC and the tribunal whether the appellant accepts that the transactions in the chain took place, whether it accepts that there was fraudulent default at the start of the chain, and – as is relevant to particular argument the appellant makes before us

[1] *Axel Kittel v Belgium State, Belgium State v Recolta Recyling SPRL* C- 439/04 & C0440/04

[2] Which guidance was updated by the UT in *Elbrook Cash and Carry Limited v HMRC* [2019] UKUT 201 (TCC)

in this appeal – whether (without making admission as to knowledge or means of knowledge) the appellant's transactions were part of an orchestrated fraud. Ammanford is yet to serve its evidence and awaits the outcome of this appeal.

6. The proceedings concern the following decisions of HMRC:

(1) HMRC denied Ammanford right to deduct input VAT of c. £500k for VAT periods 11/17 – 11/18 on the grounds that the relevant transactions were connected with the fraudulent evasion of VAT and that Ammanford knew or should have known the transactions were connected to fraud.

(2) HMRC notified Ammanford of a penalty of c. £125k under s69C VATA 1994. That section makes a person liable to a penalty where the *Kittel* conditions have been fulfilled (the transaction was connected to fraudulent evasion of VAT and the person knew or ought to have known that), and HMRC have accordingly denied the right to deduct input VAT.

7. HMRC also notified the two Directors of Ammanford (Mr Richard Safadi and Mr Adrian Stewart) of personal liability for the penalty under s69D VATA on the basis the company's actions were attributable to them.

8. The relative size of the company's operations is a key feature of this case and featured in the parties' arguments. So it is relevant to note, as recorded by the FTT's summary of HMRC's submissions (at FTT [47]), that during the VAT periods under appeal, the appellant also employed "a small number of yard staff and one bookkeeper".

9. Shortly after HMRC served its Statement of Case, and evidence on 30 April 2021, Ammanford applied for further information, which request HMRC refused. That led to the hearing which (for reasons which were not apparent to us) did not take place until 28 April 2023.

THE FTT DECISION

10. The information requests and accordingly the FTT decision concerned 11 points (set out at FTT [12]). However, the points Ammanford pursues on appeal before us have now narrowed to the following three issues:

(1) first, that HMRC must identify each and every natural person alleged to possess actual knowledge that the transactions were connected with fraud and provide particulars of all facts and matters [that] are relied on to support that contention (FTT [12(1)]);

(2) second, that HMRC must explain what type of fraud [HMRC] allege [the] scheme [to defraud] was set up to achieve – in particular, whether it was an "MTIC" fraud, or an acquisition fraud (FTT [12(7)]);

(3) third, that the HMRC must explain what [HMRC] say the appellant's role was in the scheme [to defraud]. (FTT [12(9)]).

In respect of each issue, Ammanford sought a direction from the FTT.

11. The FTT summarised HMRC's Statement of Case and noted that it had read HMRC's witness evidence (which it considered broadly speaking elaborated on or supported the points made in the Statement of Case).

12. The FTT set out the key principles that it derived from the case-law ([FTT [54]). In relation to the function of pleadings generally, the FTT referred to the summary of Judge Brooks in *Elbrook (Cash and Carry) Ltd v HMRC* [2017[UKFTT 650 (TC) which included:

(1) "The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it…" (*British Airways Pension Trustees Limited v Sir Robert McAlpine & Sons Limited* (1994) 72 BLR 26 per Saville LJ [33] – [34])

(2) "The need for extensive pleadings including particulars should be reduced by requirement that witness statements are now exchanged" but "pleadings are still required to mark out the parameters of the case that is being advanced by each party" (*McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 792 to 793 per Lord Woolf).

13. In the context of the *Kittel* case, Judge Brooks's summary also referred to Judge Mosedale's analysis in *Ronald Hull Junior Limited v HMRC* [2016] UKFTT 525 (TC) ("*Ronald Hull*") of what was required to be pleaded in relation to cases of fraud. She explained that fraud needed to be clearly pleaded together with the primary facts relied on which gave rise to the inference of dishonesty (*Ronald Hull* [28]). (The reference to primary facts arose from Lord Millett's reference to "primary facts" in *Three Rivers District Council v Bank of England* [2001] UKHL 16). Her view was that "primary" was used in the sense of "main" or principal so it was not the case that every detail needed to be pleaded (*Ronald Hull* [30]).

14. The FTT noted the Court of Appeal's subsequent decision in *HMRC v Citibank NA and E-buyer UK Limited* [2017] EWCA Civ 1416 where it was held that an allegation of actual knowledge in *Kittel* did not necessarily entail dishonesty.

15. Ammanford had argued (FTT [27]) that it was entitled to clarity as to whom HMRC alleged knew that the transactions were connected with fraud so that the relevant witnesses could be identified and their evidence prepared.

16. The FTT addressed that information request separately in relation to the *Kittel* appeal and the s69D appeal. Regarding whether HMRC were, in a *Kittel* case, required to identify each individual said to have actual knowledge, the FTT referred to Judge Jones' reasoning in *Tower Bridge GP Ltd v HMRC* [2019] UKFTT 176 (TC). That explanation included:

> "1261. HMRC do not have to identify or select individuals and accuse them of having the requisite state of knowledge, rather than running a case that by inference that there must have been such a person and that person's knowledge should be attributed to the relevant Appellant, would be. HMRC do not, in the context of a large organisation, have to identify a specific individual by name to make good their case.
>
> 1262. It is sufficient for the Tribunal to conclude that:
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> i. There must have been at least one such person;
>
> ii. That person(s) must have been an employee of the Appellant; and
>
> iii. That person(s) must have had sufficient responsibility within the Appellant such that it is proper to impute their knowledge to the body corporate.
>
> 1263. In *McNicholas* , Dyson, J. found no requirement to identify by name " *all those employees of a company who have a part to play in the making and receiving of supplies, as well as those involved in its VAT arrangements"* for the knowledge of those individuals to be attributed to an Appellant itself accused of the fraudulent evasion of VAT.
>
> 1264. In the First-tier Tribunal decision of *Citibank NA v Revenue & Customs* [2014] UKFTT 1063 (TC) (*"Citibank"*) Judge Mosedale developed this point at [85] saying:

> "85. But I do not think identification would be required: otherwise a corporate entity could avoid allegations of actual knowledge by simply refusing to cooperate with HMRC's enquiry or call any witnesses, making it impossible to identify which particular person had actual knowledge. If the circumstantial evidence was sufficient to justify it, I think a Tribunal could draw the inference that at least one person, albeit unidentified, acting on behalf of the bank had actual knowledge."

17. The FTT went on (at FTT [72]) to agree also with Judge Mosedale's comments in *Citibank FTT* (including the paragraph included in the extract from Judge Jones's decision in *Tower Bridge* set out above at [16]) and *Ronald Hull* (at FTT [71]) which set out the following:

> "**Must individuals be identified?**
>
> 38. I also think what I said in Citibank about identification of individuals was right. It is possible for HMRC to prove its case that a corporate appellant had actual knowledge without identifying a particular individual officer or employee or agent of the appellant who had actual knowledge. It can do this if HMRC can show that the company acted in such a way that it (acting by its officers and employees) must have known. If this were not the case, a company could defeat any investigation into it simply by failing to identify which person took which decisions.
>
> 39. However, in so far as it is or becomes HMRC's case that a particular officer/employee/agent of the company had actual knowledge and that that (alleged) knowledge should be attributed to the company, then the allegation that that individual had actual knowledge must be pleaded together with the primary facts relied on to support that allegation.
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> 40. It is therefore not necessary for HMRC to plead that any particular individual had actual knowledge, unless it is its case that a particular individual had actual knowledge. Nor, as I have said, is HMRC required to plead negatively. They do not have to state that they do not plead that named persons did have knowledge."

18. The FTT thus accepted (at FTT [63] and FTT [72]) HMRC's submission that identification was not required; it was enough if a tribunal could draw the inference that at least one person, albeit unidentified, acting on behalf of the corporate, must have had actual knowledge.

19. At FTT [68], the FTT noted, but rejected, Ammanford's argument that another passage in the FTT's decision in *Citibank /Ebuyer* meant that HMRC had to identify to the appellant the individuals with knowledge in order to be able to put that allegation to those witnesses – we discuss that paragraph in more detail below at [39] onwards).

20. Ammanford's information request (which had given rise to the hearing before the FTT), had also sought "all facts and matters relied on" to support the actual knowledge of the identified person. As regards the penalty under s69D VATA 1994, the FTT rejected the suggestion that HMRC had to identify the particular actions of each director and describe the parts of evidence that supported HMRC's pleading of actual knowledge. Its reasoning, in essence, was that HMRC had to plead the primary facts but that once HMRC had served its Statement of Case and the evidence it should not have to disclose lines of questioning (the FTT considered this was what Ammanford was seeking to do obliquely).

21. As regards the s69D appeal, the FTT noted (at FTT [73]) that HMRC had identified individual officers under s69D as persons to whom actions of the company were attributable. The FTT agreed with HMRC that it did not follow that meant HMRC had to "provide particulars of all facts and matters …relied on in support of that contention" (FTT [74]). The

FTT accepted HMRC had to set out *primary* facts on which it relies in relation to the s69D penalty but it considered HMRC had done that.

22. The FTT explained at FTT [76]:

> "76. … As Ms Stephenson submitted, HMRC's case was that Mr Safadi and Mr Stewart were responsible for the actions of the company during the periods under appeal – the Appellant, as I have said, had only two directors, one book-keeper and a small number of yard staff. Having carefully examined the Statement of Case and the evidence which HMRC has served, it seems to me that the Tribunal will be able to draw such inferences as it sees fit concerning the involvement of the directors and the circumstances and nature of the Appellant's trading."

23. The FTT went on to consider whether HMRC needed to provide further information on the alleged fraud and on the role of the appellant in the alleged fraud. Those issues are the subject of the appellant's second ground of appeal and we will cover the FTT's analysis when we discuss that ground below.

DISCUSSION

Ground 1 – Identification of individuals who had actual knowledge of connection with fraud

24. The main point Ammanford argues under this ground is that the FTT erred in agreeing that HMRC could put to witnesses that they actually knew that the transactions were connected with fraud even where its case was that it did not have to identify such a person and did not seek to. That, Mr Watkinson submits, was a clear error of law: HMRC had to first plead the individual had actual knowledge before it could be put to the individual in cross-examination that they had actual knowledge.

25. In support, Ammanford relies on a number of authorities on the additional pleading and particularisation obligations in cases involving pleading dishonesty (which it submits applies commensurately to the serious accusation that a person had actual knowledge that the transactions were connected to the fraudulent evasion of VAT). It also relies on *Ronald Hull* for the proposition that once HMRC's case became that a particular officer of the company had actual knowledge the relevant transactions were connected to fraud which should then be attributed to the corporate appellant, that allegation then had to be pleaded together with primary facts in support of it.

26. HMRC maintain there is no difficulty with them pleading a case that *someone* had actual knowledge yet still putting to a particular appellant's witness that the witness had actual knowledge. In summary, they argue that the pleading that *someone* had actual knowledge gave sufficient notice that an allegation of actual knowledge would be made to any of the appellant's witnesses who were speaking to the relevant transactions. HMRC have pleaded primary facts upon which it is alleged that the company, through one or more of its officers, employees and/or agents must have known of connection to fraud. The case that it has to meet will be clear to the company. If it calls witnesses who give evidence of involvement in the relevant business and transactions, those witnesses will be fully aware of allegations made and it would come as no surprise to them if they were to be asked whether they had requisite knowledge. A finding that a specified individual had actual knowledge was, Mr Foulkes argued, a route to establishing that someone had actual knowledge (which was all HMRC need to establish). It did not entail HMRC changing its case. What was important was that the witness was given the opportunity to answer the allegation in cross-examination.

27. There is much agreement between the parties about some of the basic relevant legal principles concerning the content and function of pleadings, and how those principles apply in a *Kittel* case (including those the FTT set out - see [12] – [13] above). Although, as established in *Citbank /E-buyer CA* it is established that an allegation of actual knowledge does not necessarily entail dishonesty, HMRC accept, correctly in our view, Ammanford's position that the allegation of actual knowledge of connection with fraud is a serious one. There is no dispute also that the burden of proving this allegation is on HMRC. It is also agreed (although it should be noted this was not Ammanford's position before the FTT – see [15] above) that, as a general principle, HMRC does not have to identify any named individual in order to make out their case on corporate actual knowledge.

28. Furthermore, it is accepted that, in addressing the various information requests, the FTT was correct to take stock, not only of the pleadings (i.e. HMRC's Statement of Case) but the evidence HMRC had served in assessing particularity (in line with *McPhilemy*) (although Ammanford's position is that on the particular facts of this case HMRC's evidence does not add anything to the analysis).

29. In addressing this ground, it is important, we consider, to keep clear the two distinct issues concerning pleading which arose before the FTT and before us. The first is what HMRC need to plead, at a minimum, in order to show that Ammanford, a corporate body, had the requisite actual knowledge. This was the issue raised by the information request the FTT determined in HMRC's favour.

30. The second issue is what *consequence* flows from HMRC putting its case in that way in terms of the further conduct of the case. This is the issue Ammanford principally raises in this appeal; the specific issue being whether HMRC have to amend their pleading if they want to put to a witness of the appellant in cross-examination that that witness had actual knowledge. (Mr Watkinson emphasised that the appellant was not saying HMRC were closed off from asking such questions of the witness, but they needed to seek and obtain permission to amend their pleadings before they could do it.)

31. Regarding the Upper Tribunal's jurisdiction on appeal, Mr Watkinson rightly identifies that the FTT's decision was a matter of case management discretion. (As the FTT set out at FTT [50], the application was an exercise of the FTT's power under Rule 5(3)(d) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 to require a party to provide information, which power was to be exercised in accordance with the overriding objective of dealing with a case fairly and justly.) Mr Watkinson also rightly accepts the well-established proposition that an appellate tribunal will not lightly interfere with such discretion except on limited grounds including that the FTT has made an error of principle. His case however is that the FTT's agreement with HMRC's stance represents just such an error of principle. HMRC did not, it appears to us, take issue with the alleged error being *capable* of being one of principle but argue there is no error. HMRC point out that as well as having the ability to put to the witness that they had actual knowledge, the situation could arise where they would be obliged to do that in meeting their pleaded case that *someone* acting on behalf of the company had actual knowledge.

32. As reflected by the detailed submissions the parties made to us, the point is a significant one. Before addressing that there is a preliminary question which arises over whether the FTT actually made a *decision* on the matter which is said to disclose an error of law, in other words, whether the FTT actually ruled on whether HMRC could put questions to the witnesses for the first time in cross-examination that they had actual knowledge but without having given advance notice of that.

33. That it did not so rule would not necessarily be a surprising outcome given the arguable premature nature of the point. As noted above, the appellant has not served its evidence yet. It is not known which witnesses will give evidence. It is also not known what questions HMRC will ask; it seems to us all HMRC do at this stage is flag that they want to keep the opportunity open to ask such questions of the appellant's potential witnesses. The context in which the issue has arisen is also relevant. As clarified at the hearing before us, the genesis of the particular issue regarding what *questions* might be put later in cross-examination was not raised in the appellant's information application but was something which arose through the comments HMRC's counsel made in response to Ammanford's oral arguments in the course of that hearing. Questions of what could or could not be put to witnesses at a subsequent hearing would normally be a matter of case management discretion by the FTT hearing the substantive appeal.

34. Before the FTT, the ability to run a "someone knew" case was contested, whereas in this appeal the appellant now accepts HMRC can do that as a matter of principle but argues *the consequence* of that is that HMRC cannot cross-examine the appellant's witnesses on the basis the witness had actual knowledge without first amending HMRC's pleadings to that effect.

35. Ammanford refers to various paragraphs (FTT [62][63] and [68]) to show that the FTT did make an error in relation to the issue of what cross-examination questions could be put. The first two of these paragraphs do not, however, in our view establish that such a ruling was made.

(1) At FTT [62] the FTT set out its view that there was not "…any general authority which establish[ed] that HMRC, having served its Statement of Case and evidence upon which it relies, must take a taxpayer through the inferences which HMRC consider could or should be drawn from its evidence". This was a general point about the *inferences* HMRC might invite from pleaded facts and evidence HMRC had served. The paragraph went on to say that Ammanford's requests were in effect "obliquely asking for some indication of what line of questioning would be put to the witnesses" which in the FTT's view "would be neither reasonable or proportionate". This paragraph was dealing with level of specificity of what HMRC had to state but it was not ruling that HMRC could then put to a particular witness that they had actual knowledge.

(2) FTT [63] is an acceptance of the submission, that in relation to the *Kittel* case, HMRC did not have to identify each individual said to have knowledge of connection to fraud based on the analysis in *Tower Bridge*, *Citibuyer FTT* and *Ronald Hull* – but that point - that HMRC can run their case on such basis if they choose - is not, as we have indicated, now in contention.

36. In contrast, FTT [68] does in terms reject Mr Watkinson's submission that HMRC must identify the individuals who had knowledge of connection to fraud in order to put that to witnesses. There, the FTT said:

> "Mr Watkinson relied on the decision of Judge Mosedale in *Citibank – 2014* to argue that HMRC must identify the individuals who had knowledge of the connection to fraud in order to be able to put to the Appellant's witnesses whether they knew of such a connection. As I have indicated above, at least in relation to the HMRC's *Kittel* case, I disagree."

37. We acknowledge there is some room for debate around whether the FTT was making a specific ruling on the point, when this extract is set in the wider context of the decision (where the main dispute was around whether a "someone knew" type case was possible, and given the original scope of the hearing was to deal with Ammanford's information request application). However, noting that HMRC did not take any point on the scope of the FTT decision under appeal, we consider the better view is that the FTT did make a ruling to the effect that HMRC

did not have to identify individuals who had knowledge of connection to fraud in order to be able to put to a specific witness appearing on behalf of Ammanford that that witness knew of such connection. (Although this looks to be inconsistent with the FTT's unqualified agreement with *Ronald Hull* (in particular the extract at [52] below), we note that the main point the FTT took away from *Ronald Hull* was that HMRC did not *need to* identify a specific individual with actual knowledge to make out its actual knowledge case *Kittel*. That was the key point relevant to the FTT's agreement with *Ronald Hull* as it explained the FTT's rejection of Ammanford's information request.) We are satisfied that Ground 1 of Ammanford's appeal is therefore properly directed towards an issue which the FTT decided. We therefore proceed to consider the ground's merits.

38. In doing so, it is also convenient to note at this point the following aspects of the FTT's analysis.

39. When addressing Mr Watkinson's submission, the FTT went on to set out an extract from *Citibank FTT 2014*, that included the following:

> "[80] Where the corporate entity is owned and controlled by the same person, it may be obvious that an allegation that that entity 'knew' something is an allegation that the controlling director knew that thing. It is not so clear where the corporate entity is not the alter ego of a single person, but on the contrary a subsidiary of an ultimate holding company which is likely to have a great many shareholders; and moreover where the corporate entity has a great many employees, and where the allegation of 'knowledge' appears to be connected with the knowledge and/or activities of a small number of employees who were not directors. HMRC should apply to amend their SOC to state their case on why they think the knowledge of named or unknown individuals employed by the appellant should be vicariously attributed to the corporate appellant."

40. The FTT explained the *Citibank FTT* passages (to the extent they thought it were capable of supporting Ammanford's point) needed to be treated with caution for a variety of reasons:

(1) first it was later established that actual knowledge, for the purposes of the *Kittel* principles, did not require HMRC to prove dishonesty;

(2) second, to the extent the passage was supportive, it was dependent on context (i.e. the size of the company) and the facts here were, the FTT noted, not like those of the entities in Citibank;

(3) finally, the later passages in *Citibank FTT* demonstrated that Judge Mosedale did not consider identification was necessary (in essence because of the policy consequences that would ensue for companies then being able to escape liability).

41. It is also relevant to note the FTT agreed with the proposition advanced in *Ronald Hull* that if HMRC's case *became* that a specified individual had actual knowledge then that had to be pleaded (*Ronald Hull* [39]). The FTT here did not therefore rule out the possibility that HMRC's case *could* in due course become one which involved identification.

42. The particular issue raised under Ammanford's ground before us is in essence whether by cross-examining a witness on the basis the witness had actual knowledge one *has to* regard HMRC's *case* as being that the witness had actual knowledge (with the consequence that such case had to be pleaded).

43. As to the relevant general legal principles regarding pleadings, and as indicated above, there is agreement between the parties on 1) the general purpose of pleadings (to enable the other party to prepare their case), 2) that allegations of dishonesty and other serious allegations

engage particular pleadings obligations, and 3) that allegations of actual knowledge amount to serious allegations.

44. On that latter point, Mr Watkinson's skeleton helpfully referred to various authorities for the proposition that serious allegations short of dishonesty still need to be clearly pleaded: principally *Lakatamia Shipping Co Ltd v Su & Ors* [2021] EWHC 1907 (Comm), *per* Bryan, J., at [39] – [42]; and Mann J in *The Deposit Guarantee Fund for Individuals v Bank Frick & Co AG & Anor* [2022] EWHC 2221 (Ch), at [39] – [40]. In the latter case, Mann J said at [40]:

> "This is a case of inference, and inference from disreputable conduct. The primary facts relied on must be alleged. That means in the present case the claimant will be confined to its pleading, and it is legitimate to scrutinise its pleaded case with care."

45. We also did not understand it to be in dispute that allegations of actual knowledge that transactions were connected to fraud were serious allegations and that as such they would require some form of notice. The level of particularity may not be directly equivalent to fraud or dishonesty allegations but it should be commensurate with the seriousness of the allegation. It also appears to us to be accepted by HMRC that where (as in the s69D appeal) serious allegations are made against individuals the *primary* facts from which the allegation is inferred must be set out. HMRC's position however, in summary, is that, the specific allegation is included within the general; adequate notice to Ammanford is given in the form of the pleading that someone acting on behalf of the company had actual knowledge. HMRC also emphasise that what is key is that the witness would have chance to answer the allegation in cross-examination.

46. For the reasons below, and in agreement with Mr Watkinson, we consider that the FTT's ruling, which had the effect that HMRC could put to Ammanford's witnesses that they, as an individual, had actual knowledge of connection to fraud, but without HMRC having first identified the person as an individual in respect of whom HMRC were alleging actual knowledge) represented an error of legal principle.

47. We start by noting that there is now no disagreement between the parties that HMRC are able to run a *Kittel* case without specifying particular individuals who have actual knowledge. That is consistent with the FTT's analysis in *Tower Bridge, Citibank FTT* and *Ronald Hull.* However, we consider that if HMRC wish to put, in cross-examination, to a witness appearing on behalf of the appellant, that they have actual knowledge the transactions were connected to fraud (with a view, it must be assumed, to inviting the FTT hearing the substantive appeal to make such finding) then HMRC must first have identified those witnesses as ones in respect of whom actual knowledge of fraud was alleged.

48. First, it is relevant to consider the rationale underpinning why it is sufficient for HMRC to plead that *someone*, rather than a specific person had actual knowledge. As explained in *Ronald Hull* and in *Tower Bridge* (see [15] and [16]) the reasons stem from the difficulties of pinning knowledge in relation to a specific person. It is relevant we think that the examples given in the FTT cases relate to larger organisations. The difficulties are not across the board. That indicates that, in situations where HMRC make a serious allegation against an identified individual, so as to be able to put questions to them in cross-examination, HMRC must be taken to have satisfied themselves that there is some evidential basis for that. In those circumstances the rationale for not requiring identification falls away. In other words, the fact that HMRC can plead their case on a "someone had actual knowledge" basis is effectively a concession insofar as it lowers the bar for what HMRC have to show. But there is no reason to allow reliance on that lower bar if HMRC's case is that they are able to pin the knowledge on an identified person.

49. If HMRC intend to invite a finding that a particular person has actual knowledge that, properly understood, is not, as HMRC argue, a route to saying *someone* had knowledge and therefore the company had knowledge. Instead, it is a rather more direct route to saying *the company* had actual knowledge. The identification of a specific person effectively by-passes the need to rely on a case only that someone had actual knowledge.

50. Secondly, even if it is considered that HMRC's case is not to be regarded as having changed to being that a specific person had actual knowledge, there would still, we consider, be a requirement to plead that the particular individual had actual knowledge. This would be on the basis that alleging a named individual had actual knowledge the transactions were connected to fraud for the purposes of making out a case on *Kittel* self-evidently amounts to a primary fact which is relevant to the overall allegation on corporate actual knowledge, (whether that is put in terms of the company having actual knowledge or an allegation that someone acting on behalf of the company had actual knowledge).

51. Thus on either of the above two bases, when it is argued that an identified individual had actual knowledge, that becomes HMRC's case or a primary fact in relation to at least part of it (in that HMRC would not be precluded from also arguing that some other unidentified individuals also had actual knowledge).

52. This is consistent with the principle stated by Judge Mosedale in *Ronald Hull* (at [43]) that:

> "…HMRC cannot be required to state whether or not they do allege fraud against any particular individual but, if they do not allege fraud against a named individual, then they must not seek to prove fraud against an individual at the hearing." (*where the references to allegations of fraud are to be understood from the context as references to allegations of actual knowledge the transactions were connected to fraud*)

53. HMRC argues that *Ronald Hull* should be distinguished because it was given before the Court of Appeal in *Citbank / Ebuyer* which, as noted above, confirmed dishonesty was not necessarily entailed in an actual knowledge allegation. We do not think that is a valid basis of distinction. The principle Judge Mosedale stated would apply equally to the serious allegation that a person had actual knowledge the relevant transactions were connected to fraud.

54. HMRC argue that in any case Judge Mosedale's view at [43] was wrong in principle. The evidence may change, and the witness' oral evidence might be different from the statement. It cannot be right, Mr Foulkes argued, that HMRC would, in such circumstances have to apply to amend its pleadings, or else be barred from running a case that the individual had actual knowledge.

55. We disagree. There would be nothing surprising about imposing the discipline of HMRC having to request permission to amend the pleadings and conversely good reason to conform to that discipline. Pleadings are there so the opposing party knows what case it has to answer. They shape the evidence which is advanced and the scope of disclosure. Having to request permission to amend pleadings will mean any prejudicial impact on the evidence or disclosure that might otherwise have taken place can be aired and resolved fairly and justly.

56. As to Mr Foulkes' proposition that the case-law suggests it is enough that the witness can answer questions in cross-examination, that is not reflected by the insistence in several authorities, that Mr Watkinson drew our attention to, that relevant allegations are to both be pleaded and cross-examined. (Although these cases concerned allegations of dishonesty, there is no reason to suppose the same would not apply commensurately to allegations which fell short of dishonesty but which were serious nonetheless.)

57. So in *HMRC v Dempster (t/a Boulevard)* [2008] EWHC 63 (Ch) Briggs J as he then was noted at [26] the "cardinal principle …that if serious allegations, in particular allegations of dishonesty are to made against a party who is called as a witness they must be both fairly and squarely pleaded, and fairly and squarely put to the witness in cross-examination" (emphasis added). Similarly he later noted in *Abbey Forwarding Ltd (in liquidation) v Hone and others* [2010] EWHC 2029 (Ch) at [47] that before a finding of dishonesty can be made it must not only be pleaded but also put in cross-examination.

58. While it is correct that the facts of the cases those authorities in turn referred to turned on deficient cross-examination that does not undermine what Briggs J said regarding a dual requirement of pleading and cross-examination. In those underlying authorities there was as a result equally no specific need to consider the proposition Mr Foulkes advances that cross-examination, but without advance pleading, would be sufficient to enable a court or tribunal to find the serious allegation was made out. His proposition would also go against the rationale for advance pleading more generally namely of enabling the other party to know the case they had to meet.

59. As to Mr Foulkes's argument that the "someone had actual knowledge" allegation provides sufficient notice to Ammanford, knowing that a particular individual is alleged to have actual knowledge might well, in our view, engage different and more detailed and targeted responsive evidence or disclosure than a general allegation that someone knew. Simply providing an opportunity to deal with it for the first time in cross-examination would not address that concern. The issue is not only about fairness to the witness of knowing the allegation in advance, but also about the party knowing what case it has to meet. The point is not that the taxpayer would be surprised, given the overall allegation, that a particular individual or individuals were alleged to have actual knowledge, but that if that is a finding that HMRC will be inviting the tribunal to make it is only fair that the taxpayer can provide its evidence and disclosure knowing that specific allegation.

60. In coming to this view, it should be emphasised that the relevant allegation of actual knowledge here is an issue on which HMRC bears the burden. None of this should be taken to suggest that an advance pleading of dishonesty or other serious allegations would be required in order to be able to put such allegations to the witness of the party who bore the burden for instance to displace an assessment (as explained by Henderson J in *Ingenious Games LLP & Ors v HMRC* [2015] UKUT 105 (TCC) at [62] to [65]). (The written or oral evidence underlying those serious allegations will of course have to be before the court.)

61. We address the consequences of the FTT's error after we deal with the remaining aspects of this ground of appeal and Ground 2.

Other points under Ground 1

62. As regards the remaining points Ammanford argues under Ground 1, these properly concern matters the FTT decided. In relation to the s69D appeal it is argued the FTT erred in agreeing that HMRC had set out primary facts of the allegation because it had set out case that the directors "were responsible for the actions of the company during the periods under appeal". Apart from a "one man band" set up, simply being responsible for the actions of a company as a director would not be a primary fact supporting actual knowledge. Thus, Mr Watkinson argues, the FTT ought to have directed HMRC to provide the primary facts for the allegation (according to *Ronald Hull* which FTT purported to follow). Furthermore, he also argues the FTT erroneously concluded that mere directorship was sufficient to found the s69D personal liability which would render the "attributability" requirement under that provision redundant.

63. In agreement with Mr Foulkes, neither of these points however amount to an error of law by the FTT. The FTT's reference to the directors being responsible cannot be viewed in

isolation but must take account that it had "carefully examined the Statement of Case and the evidence which HMRC [had] served" noting the particular set up of Ammanford i.e. that it had "only two directors, one book-keeper and a small number of yard staff". Its statement regarding responsibility was thus grounded in an analysis of the particular circumstances of the appellant company as pleaded in the Statement of Case and the served evidence, not simply on the footing of the directors' mere status as directors. There was accordingly no error of principle on the FTT's part. As to the FTT's view regarding the sufficiency of HMRC's statement of the primary facts, the FTT was clearly satisfied that the Statement of Case and evidence had done enough to make the primary facts clear. That was plainly a matter of judgment and nothing in Ammanford's grounds demonstrated why it was not open to the FTT to reach that conclusion.

Ground 2 – the type of fraud alleged and Ammanford's role in it

64. Under this ground Ammanford submits the FTT was wrong to refuse appellant's application that HMRC explain 1) what type of fraud they alleged the asserted scheme to defraud had been set up to achieve – was it an "MTIC fraud" or an "acquisition fraud" 2) the appellant's alleged role in the fraud.

65. At FTT [90] the FTT explained:

> "As I have discussed above at paragraphs 62-65, the authorities establish that it is not necessary for a taxpayer to know the details of the fraud which HMRC allege has occurred. In particular, the comments of Arden LJ in *Fonecomp* at [51] quoted above at paragraph 64 above (a relevant authority which was not cited to me) make this point clear. Accordingly, since HMRC do not need to prove that the Appellant knew the details of the fraudulent evasion of VAT, I do not consider it necessary for HMRC to provide <u>further</u> information as to the nature of the fraud in this case." (Emphasis added)

66. As the FTT had set out earlier at FTT [64] the Court of Appeal in *Fonecomp Ltd v HMRC* [2015] EWCA Civ 39 (at [51]) had held that for the purposes *Kittel* knowledge, the trader just needed to know or have the means of knowing "that the fraud has occurred, or will occur, at some point in some transaction to which his transaction is connected". The trader did not need to know the specific details of the fraud.

67. Ammanford does not disagree with that. Its point is that the FTT wrongly conflated <u>proof of knowledge</u> by Ammanford of the details of the scheme (which was not per *Fonecomp* required) and the primary facts of the scheme to defraud on which HMRC sought to found the <u>inference</u> that Ammanford knew of connection with fraudulent evasion of VAT. It says that the type of fraud was important to know because different types of fraud permitted different inferences to be drawn. (As explained by the FTT in *CCA Distribution Ltd (In Administration)* [2020] UKFTT 222(TC), in an "acquisition fraud" the fraudster imports goods free from VAT (the relevant terminology for EU imports being "acquire"), then sells the goods to a genuine buyer within the UK and then absconds without paying HMRC the VAT due on the sale. MTIC fraud also involved a default by the UK entity acquiring goods from the EU. But the way the fraud worked was different. It relied on a trader further down the chain having, under VAT law, to pay VAT to UK suppliers but not the EU customer they sold onto and then being able to recover the VAT they paid their UK supplier from HMRC. In contrast to acquisition fraud, which needed a genuine buyer for the goods, MTIC fraud did not take place in a genuine market but relied on engineering purchases and sales of goods to create the situation where tax repayments from HMRC were due.)

68. Ammanford also says that it needed the information detailing the fraud to answer the *Fairford* direction (which as mentioned above ([5]) typically asks the appellant to state in

writing whether they accepted the transaction chains "were part of an orchestrated overall scheme to defraud the revenue").

69. Ammanford also argues the FTT erred in concluding there was no requirement on the part of HMRC to provide information on Ammanford's purported "role" in the asserted scheme to defraud. (The reference to Ammanford's role arose in the context of paragraph 81 of HMRC's Statement of Case where HMRC alleged the transactions "were undertaken as a part of a plan to defraud the Revenue. Given the role played by the Appellant, and the information known to it, it must have known of the connection with the fraudulent evasion of VAT.")

70. The FTT dealt with that particular information request at [93] as follows:

> "Again, I think the evidence speaks for itself. HMRC are asserting, for example, that the Appellant's place in the deal chain had no commercial logic and that it was essentially making money without any commercial rationale. HMRC contend that the Appellant did not take custody of the goods and allowed its customer to pay its supplier directly. HMRC contend that the Appellant kept no record of what was bought or of weights and prices. HMRC further contend that the Appellant's turnover grew very rapidly even though, on HMRC's view, the Appellant did not contribute anything of significant commercial value. It will be for the Tribunal to assess HMRC's evidence when carrying out its overall evaluative exercise. I therefore think there is no need for HMRC to provide further information on these points." (Emphasis added)"

71. Ammanford says none of these examples however identifies any "role" Ammanford was said to play in the asserted scheme.

72. Mr Foulkes's response was that there was "no magic" in whether the fraud was acquisition or MTIC fraud, indeed *CCA Distribution* acknowledged any variation between two methods could be possible. What was important, in his submission, was not the label of the fraud but the actual nature and features of the chain of transactions which HMRC relied on to say the fraudulent scheme existed. It was that which enabled the appellant to address evidence as to what it would and should have been aware of within supply chain. We agree with that submission. We also agree that for the same reason there was no difficulty in Ammanford being able to respond to the *Fairford* direction. HMRC identify factors for why it is said the deals lacked commercial logic. Ammanford can take a view on whether it considers those indicate an overall orchestrated scheme to defraud. If they are not satisfied then it is of course open to them not to agree the point.

73. We also agree with Mr Foulkes's submission that the FTT was entitled to conclude the information provided by the Statement of Case on Ammanford's *role* was sufficient. The role HMRC were referring to, as the FTT correctly appreciated, was simply that Ammanford was involved in transactions which had no commercial logic. The reference to role was not speaking to a particular role in terms of MTIC jargon such as a "broker".

74. As for Ammanford's submission that the FTT wrongly conflated the fact that HMRC did not have to show Ammanford knew the particulars of the fraud with there being no obligation on HMRC to provide further information on the fraud for the purpose of allowing inferences to be drawn, Mr Foulkes accepts that these are separate issues but emphasises we should look at the totality of the FTT's reasoning. He acknowledges, as he submits the FTT did, that *some* information regarding the alleged fraud needed to be provided but argues that the FTT was correct to conclude that HMRC had provided sufficient information and that no further information was required. He underscores the FTT's references to "further information" in FTT [90] and FTT [93] and to "Again" at the beginning of FTT [93].

75. We consider however that the wording of FTT [90] clearly *does* link the question of what HMRC had to prove in terms of knowledge of the fraud with HMRC not having to provide further information. As both parties acknowledge, the one did not follow from the other. That HMRC did not need to show knowledge of the specifics of the fraud did not mean there could not be relevant inferences that might be drawn from information pertaining to the specific nature of the fraud. That error would apply just as much to further information as it would to the information already provided. Nevertheless, in agreement with Mr Foulkes' case in the alternative, we consider the point does not assist Ammanford for the reasons already discussed. The FTT rightly came to the view that the information HMRC had already provided (the lack of commercial logic, and the various indicators of that) gave the appellant sufficient information on what HMRC's case was regarding the inferences to be drawn from the alleged fraud. The FTT's error was immaterial. It did not affect the ultimate analysis that HMRC's references to factors which indicated a lack of commercial logic were sufficient information for the purpose of the appellant preparing its case.

76. This ground of appeal must therefore be rejected.

DECISION

77. We set aside the FTT Decision and remake it, but only to the extent necessary to correct the error of law we have identified above at [46] in relation to Ground 1, to incorporate the reasoning at [47] to [59], and to remove the error under Ground 2 noted above at [75]. The remade decision accordingly rejects the proposition that HMRC may put to a witness appearing on behalf of Ammanford that the witness had actual knowledge of connection to fraud without having pleaded a case that identified such witness. The effect is that should HMRC wish to put to specific witnesses appearing on behalf of Ammanford that they had actual knowledge, HMRC will need to apply to amend its pleadings. In all other respects our remade decision adopts the FTT's refusal of Ammanford's information request and does so for the reasons the FTT gave.

78. The appellant's appeal is allowed in part.

JUDGE SWAMI RAGHAVAN

JUDGE ASHLEY GREENBANK

Release date: 14 December 2023